COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1637 **Cir. Ct. No. 02FO000062**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

DOOR COUNTY,

PLAINTIFF-RESPONDENT,

V.

FREDRIC WITTIG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Door County: PETER C. DILTZ, Judge. *Affirmed*.

¶1 CANE, C.J.[1] Fredric Wittig, pro se, appeals from a judgment finding his private on-site wastewater treatment system (POWTS) in violation of a Door County ordinance. He argues the judgment should be reversed because

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

(1) the County did not prove its case by clear and convincing evidence, (2) the trial court erred by accepting the County's witnesses' testimony, (3) that the rebuttable presumption contained in WIS. ADMIN. CODE § COMM 83.03(2)(b)2 (2000) is unreasonable,[2] and (4) that the County entered his land to conduct its survey in violation of his constitutional rights. We affirm.

Background

¶2 Wittig has lived on an island in the Sawyer Harbor area in the Town of Nasewaupee since 1968. The property is not connected to public water utilities and services wastewater and effluents through a POWTS. The POWTS was constructed sometime during the 1940s. In 2000, the Door County Sanitarian Department conducted a survey of POWTS in this area to identify the systems and determine if they were failing as defined in WIS. STAT. § 145.245(4).[3]

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[2] WISCONSIN ADMIN. CODE § COMM 83.03(2)(b)2.b states, "an existing POWTS installed prior to December 1, 1969, with an infiltrative surface of a treatment and dispersal component that is located less than 2 feet above groundwater shall be considered to discharge final effluent that is sewage, unless proven otherwise."

[3] WISCONSIN STAT. § 145.245(4) states:

> FAILING PRIVATE SEWAGE SYSTEMS. The department shall establish criteria for determining if a private sewage system is a failing private sewage system. A failing private sewage system is one which causes or results in any of the following conditions:
>
> (a) The discharge of sewage into surface water or groundwater.
>
> (b) The introduction of sewage into zones of saturation which adversely affects the operation of a private sewage system.
>
> (c) The discharge of sewage to a drain tile or into zones of bedrock.
>
> (d) The discharge of sewage to the surface of the ground.

(continued)

¶3 On November 10, 2000, the department determined Fredric Wittig's POWTS was failing. It found the bottom of the POWTS was located less than two feet above groundwater, it caused or resulted in the discharge of sewage into surface or groundwater and introduced sewage into zones of saturation that adversely affects its operation. *See* WIS. STAT. § 145.245(4)(a) and (b). The department issued Wittig an enforcement order identifying his system as failing, the grounds for its failure, and an order to replace the existing system before November 21, 2001. Wittig was later given an extension to replace the system, yet he did not abate the violation and continued to operate his failing POWTS. On February 5, 2002, the Door County Sanitarian issued Wittig a citation for violating DOOR COUNTY, WIS., CODE § 21.04C(1)(g).[4] Wittig contested the violation.

¶4 At trial, sanitarian John Teichtler and assistant sanitarian Chris Olson testified and concluded that Wittig's POWTS was a failing system because it discharged sewage into groundwater. They determined the POWTS was located less than two feet above groundwater by calculating the difference between Wittig's system's elevation, 579.50 feet, and data measuring varying elevations of Lake Michigan's surface waters.[5] Because Wittig's POWTS' elevation was less than two feet above groundwater, a rebuttable presumption arose that it was

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> (e) The failure to accept sewage discharges and back up of sewage into the structure served by the private sewage system.

[4] DOOR COUNTY, WIS., CODE § 21.04C(1)(g) states: "The infiltrative surface of a treatment or dispersal component of a POWTS existing prior to December 1, 1969, which consists in part of soil may not be located in bedrock or groundwater."

[5] This data was obtained from the Army Corps of Engineers and the National Oceanic and Atmospheric Administration. It measured the twenty-year high elevation for Lake Michigan as being 582 feet, the long-term lake average elevation was 578.40 feet, the elevation on October 2, 2000, was 578 feet, and the level as of the date of trial was 577.4 feet.

discharging sewage into the groundwater and was therefore failing. *See* WIS. ADMIN. CODE § COMM 83.03(2)(b)2; *see also* DOOR COUNTY, WIS., CODE § 21.02C(3)(d).[6]

¶5 Wittig produced a lab report of a water sample that was collected from his well that indicated the water was bacteriologically safe in order to prove his system was not discharging sewage into the groundwater. However, Teichtler testified the evidence was irrelevant because a water sample from a well is usually much deeper than where the elevation of a POWTS is located. Additionally, he stated groundwater flows could be different for a well source than from where the effluent from POWTS would be flowing.

¶6 Wittig also attacked the foundation of the presumption by attempting to show that the water table was in fact much lower than the data relied upon by the sanitarians. Wittig produced a photograph of a test pit he dug on his property that was three feet deep, yet showed no visible groundwater. From this photograph, Wittig argued it was impossible to conclude that his system was in fact discharging effluent into groundwater because, at the time of the taking of the photograph, no groundwater existed at that depth. However, Olson discounted the probative value of this evidence. Given the fluctuations in water levels, Olson testified a morphological evaluation of the soil removed from the pit would be necessary before it could be determined whether the water table was in fact lower

[6] DOOR COUNTY, WIS., CODE § 21.02(3)(d) mirrors WIS. ADMIN. CODE § COMM 83.03(2)(b)2 with the exception that it requires a greater separation distance between the POWTS and the groundwater. Section 21.02(3)(d) states: "An existing POWTS installed prior to December 1, 1969 with an infiltrative surface of a treatment and dispersal component that is located less than 3 feet above groundwater or bedrock shall be considered to discharge final effluent that is sewage, unless proven otherwise."

than the observed level of Lake Michigan. While not entirely clear from the record, it seems a morphological evaluation of the soil underneath Wittig's POWTS was not conducted.

¶7 The trial court ultimately found the sanitarians' testimony and conclusions credible. Because Wittig had not rebutted the presumption that his POWTS was failing, the court found it to be a failing system under WIS. STAT. § 145.245(4)(a), WIS. ADMIN. CODE § COMM 83.03(2)(b)2.b, and in violation of DOOR COUNTY, WIS., CODE § 21.04C(1)(g). Wittig appeals.

Discussion

¶8 Wittig first argues that the County failed to prove his POWTS was failing by clear and convincing evidence. The County proposes the appropriate burden of proof is the preponderance of the evidence, and on this standard the record is sufficient to sustain the judgment.

¶9 There are two burdens of proof in civil actions: preponderance of the evidence and clear and convincing evidence. The preponderance of the evidence standard applies in ordinary civil actions. ***Kuehn v. Kuehn***, 11 Wis. 2d 15, 26, 104 N.W.2d 138 (1960). The clear and convincing standard applies in cases where public policy requires a higher standard of proof than in the ordinary civil action. ***Madison v. Geier***, 27 Wis. 2d 687, 692, 135 N.W.2d 761 (1965). This burden of proof has been extended to civil actions involving fraud, undue influence, criminal acts, reformation, and mutual mistakes. ***Id.*** Under either standard, the County met its burden.

¶10 When reviewing a judgment, the issue for this court is not whether we would have rendered the same judgment, but whether there is any credible

evidence in the record and reasonable inferences to sustain the judgment. *See* ***Hamed v. County of Milwaukee***, 108 Wis. 2d 257, 272, 321 N.W.2d 199 (1982). We view the facts in the light most favorable to support the judgment, ***id.***, and evidence supporting the verdict is accepted unless it appears patently incredible. ***Bergmann v. Insurance Co. of N. Am.***, 49 Wis. 2d 85, 87, 181 N.W.2d 348 (1970). Patently incredible evidence is that type of evidence which conflicts with nature or fully established or conceded facts. ***Day v. State***, 92 Wis. 2d 392, 400, 284 N.W.2d 666 (1979).

¶11 The trial court found the sanitarians' testimony established the basic facts that entitled the County to the evidentiary presumption contained in WIS. ADMIN. CODE § COMM 83.03(2)(b)2.[7] *See* WIS. STAT. § 903.01. Wittig, however, contends the sanitarians' conclusion was based upon estimates and guesses and not upon actual measurements of his POWTS' depth or the groundwater's elevation. While Wittig produced evidence he hoped would convince the trial court of this, he was unsuccessful. Instead, the trial court found the sanitarians' testimony credible and ultimately relied upon it as the basis for finding Wittig's POWTS to be failing. The credibility of the witnesses is properly the function of the trier of fact. ***Gauthier v. State***, 28 Wis. 2d 412, 416, 137 N.W.2d 101 (1965). Based upon our review of the record, we cannot conclude the sanitarians' testimony was patently incredible. *See* ***Day***, 92 Wis. 2d at 400. Even

[7] Wittig argues DOOR COUNTY, WIS., CODE § 21.02C(3)(d), which allows the presumption to arise if the POWTS is less than three feet from groundwater, is in contravention of WIS. ADMIN. CODE § COMM 83.03(2)(b)2, which gives rise to the presumption if the POWTS is less than two feet from groundwater. Even if this is true, the argument is immaterial. The facts of the case reveal Wittig's POWTS was less than two feet above groundwater. Thus, even if the Door County Code is in conflict with the administrative code provision, the County still obtained the presumption by virtue of § COMM 83.03(2)(b)2.

though Wittig characterizes the evidence he produced as being strong, reliable, and demonstrative, it is also up to the trier of fact to determine the weight to be given to the evidence and to resolve any evidentiary conflicts. *See* ***State v. Curiel***, 227 Wis. 2d 389, 420-21, 597 N.W.2d 697 (1999). Ultimately, it concluded the County established the presumption and Wittig had not rebutted it. The record contains credible evidence to sustain this finding.[8]

¶12 Wittig's argument is also entwined with a statutory interpretation question of what constitutes "groundwater." This presents a question of law we review de novo. ***Burg v. Cincinnati Cas. Ins. Co.***, 2002 WI 76, ¶15, 254 Wis. 2d 36, 645 N.W.2d 880. Wittig claims it was error for the trial court to accept the sanitarians' testimony that the surface water elevation of Lake Michigan could be used to determine the elevation of the island's groundwater. He directs us to WIS. STAT. § 160.01(4), which defines groundwater as

> any of the waters of the state, as defined in s. 281.01(18), occurring in a saturated subsurface geological formation of rock or soil.

Wittig contrasts this definition of groundwater with WIS. ADMIN. CODE § COMM 81.01(252) (2003), which defines "surface water" as

> those portions of Lake Michigan and Lake Superior within the boundaries of Wisconsin, all lakes, bays, rivers, streams, springs, ponds, impounding reservoirs, marshes, water courses, drainage systems, and other surface water, natural or artificial, public or private within the state or under its jurisdiction, except those waters which are

[8] Because there is sufficient credible evidence to sustain the judgment, Wittig's argument that a POWTS cannot be considered failing if it might fail in the future is of no avail. So, too, is his argument that unique considerations of the island should factor into whether his POWTS is failing. Simply stated, the County met its burden that Wittig's POWTS is failing as defined by the law.

> entirely confined and completely retained upon the property of a facility.

Wittig notes that groundwater is not included in this section's definition of surface water. This is not surprising, he reasons, since § 160.01(4) defines groundwater as subsurface water. As a result, the sanitarians could not rely on Lake Michigan's surface water levels as a basis for finding the island's groundwater level. We do not agree.

¶13 Wittig's argument overlooks a key detail. The definition of groundwater in WIS. STAT. § 160.01(4) references WIS. STAT. § 281.01(18) for a definition of "waters of the state." Section 281.01(18) defines waters of the state as

> *those portions of Lake Michigan* … within the boundaries of this state, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, draining systems and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdiction. (Emphasis added.)

This definition read in conjunction with § 160.01(4) leads to the conclusion that groundwater can include subsurface surface water of Lake Michigan. Thus, the sanitarians were not in error to rely on the elevation of Lake Michigan's surface water as the elevation of the island's groundwater.

¶14 Wittig argues such a conclusion confounds logic. He claims it is pure nonsense to conclude groundwater, which by definition must occur subsurface, somehow includes surface water. What Wittig fails to appreciate is that "water of the state" and "groundwater" are legal terms of art that have been crafted by the legislature. Our conclusion is not illogical because the legislature has defined these terms in an overlapping manner. Nor is this conclusion impractical. It may seem perplexing at first glance, but it makes sense when

considered in light of the relationship between a body of water and an island. As Teichtler testified, the surface water of Lake Michigan is actually a physical observed position of the island's groundwater. From the perspective of the island, the lake is essentially an outcropping of groundwater.

¶15 Having determined that the basic facts giving rise to the presumption were established, the effect of the presumption required Wittig to prove that the nonexistence of the presumed fact—that is, that his POWTS was discharging sewage into groundwater—is more probable than its existence. *See* WIS. STAT. § 903.01.[9] Wittig claims, without citation to authority, that it is unreasonable to shift the burden of disproving the presumed fact to the property owner because no testing method is defined in the administrative code. Wisconsin has a long tradition of recognizing presumptions and the shifting of burdens to defendants in civil cases. *See* ***id.***; *see also* 7 DANIEL D. BLINKA, WISCONSIN PRACTICE: EVIDENCE, §§ 301.1-301.4, at 63-73 (2nd ed. 2001). Assuming a presumption could even be attacked on reasonableness grounds, we do see how the lack of a testing method listed in the administrative code would render the presumption unreasonable. If anything, the lack of a codified test gives the property owner a greater advantage in disproving the presumed fact in that there are no restrictions

[9] WISCONSIN STAT. § 903.01 states:

> **Presumptions in general.** Except as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain basic facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

on the type of evidence that will be necessary to rebut the presumption. The end result is that property owners could have a greater selection of expert witnesses and testing methods at their disposal to combat the presumption. The fact that Wittig failed to rebut the presumption does not render the presumption unreasonable.

¶16 Finally, Wittig argues that the County entered his land to conduct its survey in violation of his constitutional rights. In support of this argument, Wittig cites, and then quotes, the full text of the Fourth Amendment to the United States Constitution. Given the infant development of this argument, we decline to comment on it further. ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (we do not address amorphous and insufficiently developed arguments).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.